NFS Litigation Weekly
October 25, 2019

Ecosystem Management Coordination

Bonus Trivia: What is this picture of? Hint: It's water, but NOT for irrigation

Court Decisions

Timber | Region 1

Alliance for the Wild Rockies, et al. v. Leanne Marten (19-0106, D. Mont.) **Region 1**— On October 9, 2019, Montana District Court denied the plaintiffs' Motion for Preliminary Injunction, concerning the **Tenmile South Helena Timber Management Project** on the **Helena-Lewis and Clark National Forest** (HLCNF). The court found that the plaintiffs failed to establish a likelihood of irreparable harm. The court considered the delay in the plaintiffs' complaint from the time when the project was authorized and subsequently implemented and noted that they should have filed their case as soon as timber sales were awarded, not while project activities were well underway. Furthermore, the plaintiffs did not allege irreparable harm that would befall on the grizzly bear. Finally, the Court stated that plaintiffs at best allege the possibility of harm, which is not sufficient for the Court to issue a preliminary injunction.

Litigation Update

Timber/Forest Management | Region 3

Wildearth Guardians v. US Fish and Wildlife Service (FWS) and US Forest Service (13-151, D. Ariz.) **Region 3** – On October 10, 2019, the Government filed a Motion to Alter/Modify the Court's September 12, 2019, judgement regarding a failure to comply with procedural and substantive duties under the Endangered Species Act (ESA) to conserve and recover the **Mexican Spotted Owl** (MSO) in Arizona and New Mexico.

The Government requests the Court to:

1. Alter its judgement concluding the FWS used the best scientific data available at the time of its decision and appropriately addressed the owl's prospects for recovery.
2. If unwilling to alter its judgement, modify the current injunction. The injunction should only address the specific irreparable harm to the owl that Plaintiff have demonstrated (i.e., a generalized harm of "logging" does not warrant a broad injunction). The following categories of timber management activities do not harm the MSO.
    - Activities outside owl habitat where project level consultation has occurred (e.g., mechanical thinning)
    - Activities involving small-scale, incidental cutting (e.g., hazard trees; routine maintenance for infrastructure; U.S. Capitol Christmas tree; personal Christmas tree cutting; personal use forest products; and, special product collections by tribes)
    - Prescribed burns
    - Projects with project-specific forest plan amendments and supporting, stand-alone Section 7 consultation.
    - Commercial fuelwood gathering

UPDATE: On October 23, 2019, the Court Approved the Stipulation to Modify the Injunction

- Projects entirely outside of the MSO protected activity centers
- Prescribed burn projects
- Commercial firewood outside of the MSO habitat up to the equivalent of 272 acres in the Gila National Forest
- The cutting of the U.S. Capitol Christmas Tree
- Personal Christmas tree cutting
- Cutting of personal use forest products such as vigas and latillas, special product collection by tribes for ceremonial purposes, and cutting of hazard trees.

New Cases

Realty | Region 2

Maureen McCluskey and Robert Oxenberg v. United States of America (19-1516, US Court of Federal Claims) **Region 2** – On October 1, 2019, plaintiffs filed suit in the US Court of Federal Claims alleging **taking** ($2,000,000 in value) by the United States of approximately 10 acres **of private property** on the **White River National Forest**, east of the town of Aspen, Colorado. Plaintiffs contend the Forest Service continues to assert federal ownership of Plaintiff's property, notwithstanding clear evidence existing in records of the Forest Service, and in the public records of Pitkin County. The plaintiffs also plan to bring suit in the United States District Court for the District of Colorado, under the provisions of the Administrative Procedure Act. No additional complaint has been filed as of October 18, 2019.

Forest Management | Region 5

Environmental Protection Information Center v. Carlson, et al. (19-06643, D. N. Cal.) **Region 5**— On October 16, 2019 the plaintiff filed a complaint in the District Court of Northern California against the Forest Service concerning the **Ranch Fire Projects (Bartlett, Deer Valley, Pine Horse Valley, M3/Felkner and M5, and M10 Roadside Hazard Tree Maintenance Projects)** on the **Mendocino National Forest** and a portion of the **Berryessa-Snow Mountain National Monument**. The plaintiff claims violations of the National Environmental Protection Act (NEPA), and the Administrative Act (APA).

Specifically, the plaintiff claims:

- "The various Ranch Fire Projects are timber salvage projects, which would harvest fire-damaged trees from up to 7,000 acres. In fact each of the projects exceed and often greatly exceed the 250 acre limitation of the timber salvage categorical exclusion (CE) in 36 C.F.R. § 220.6(e)(13), and therefore the Forest Service was required to prepare an Environmental Assessment (EA) or Environmental Impact Statement (EIS).
- Here however, the Forest Service decided to limit its NEPA analysis by inappropriately choosing the "repair and maintenance of roads" CE (36 C.F.R. § 220.6(d)(4)), which does not fit the type of timber salvage activities proposed for each of the projects in the Ranch Fire area.
- The Forest Service's failure to prepare an EA or EIS for these timber salvage projects violates its own regulations and NEPA".

For relief the plaintiff request the Forest Service prepare one or more EAs or EISs for the projects and consider alternatives. In addition, plaintiff requests the court enjoin the Forest Service from "selling and removing felled trees and limit felling to imminently hazardous trees along essential public travel corridors to avert public safety concerns until the Agency has

properly complied with NEPA." Also, Plaintiffs request enjoining the Forest Service from felling trees along Maintenance Level 1 roads and off-highway vehicle trails within project areas.

Forest Management | Region 6

Alliance for the Wild Rockies v. United States Forest Service, et al. (19-00350, E. D. Wash.)- Region 6— On October 16, 2019, the plaintiff filed a complaint in the Eastern District of Washington against the Forest Service concerning the recently approved **Mission Restoration Project and Forest Plan Amendment #59 (Project)** which authorized extensive logging, burning, and road building in the **Methow Valley Ranger District** of the **Okanogan-Wenatchee National Forest** (OWNF)**.** The plaintiff claims the Forest Service violated the National Environmental Policy Act (NEPA), Administrative Procedure Act (APA) and National Forest Management Act (NFMA) by approving the project and issuing a finding of no significant impact (FONSI). The plaintiff claims there will be significant adverse impacts to water resources and fish, vegetation, soils and wildlife. Specifically, the plaintiff claims the Forest Service:

- Violated NEPA and APA by not preparing an Environmental Impact Statement (EIS).
  - Failed to take a hard look at the projects significant adverse environmental impacts and failed to provide a full and fair discussion of those impacts.
  - Erred when relying on and delaying uncertain mitigation and/or beneficial actions and impacts of the project to justify a conclusion of not having probable significant adverse environmental impacts.
- Violated NEPA and APA by failing to adequately analyze environmental impacts.
  - Failed to identify and evaluate the direct, indirect and cumulative impacts of the project in the environmental assessment (EA).
  - Failed to adequately analyze cumulative environmental impacts because the EA failed to address the results of monitoring required under the Forest Plan.
  - Failed to compensate for the lack of monitoring in the EA with proper cumulative effects analysis.
- Violated NFMA and APA for failure to comply with the OWNF Forest Plan.
  - Failed to be consistent with applicable land management plan.
  - Failed to monitor population trends as direct by the Forest Plan, thereby violating NFMA.

The plaintiff seeks an order declaring the Forest Service violated APA, NEPA, and NFMA, and enjoining the Forest Service from implementation of the project. The plaintiff further seeks the withdrawal of the Final EA and FONSI until an adequate analysis is completed.

Wildlife | Region 1

Neighbors Against Bison Slaughter, et al. v. National Park Service, et al. (19-03144, D.D.C.) **Region 1**— On October 21, 2019 the plaintiffs filed a complaint in the District Court for the

District of Columbia against the National Park Service and the Forest Service (Agencies) concerning the **continued allowance of the hunting of bison that have migrated out** of the **Yellowstone National Park** and the **Custer Gallatin National Forest through Beattie Gulch**. The plaintiffs claim violations of the Yellowstone National Park Act (YNPA), The Forest Service Organic Act of 1897 (FSOA), National Forest Management Act (NFMA), Multiple-Use Sustained Yield Act (MUSYA), National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA). Specifically, the plaintiffs claim the Agencies:

- Violated the APA by arbitrarily and capriciously implementing the YNPA, FSOA, NFMA, MUSYA, and NEPA and by creating circumstances that drastically increase the chances of hunters, private property owners, neighbors and visitors dying and evicts the property owners and residents as well scares away customers from renting cabins.
- Failed to adequately analyze the actions as a connected action under NEPA claiming that because the Agencies have control over the disposing of surplus bison and the bison hunt, NEPA requires the entire Interagency Bison Management Plan (IBMP) be analyzed.
- Failed to analyze the environmental effects of the bison hunting on local residents. The plaintiffs claim that since the Record of Decision was signed in 2000, bison hunting has increased and the Agencies implemented changes to the IBMP in 2011, but did not qualify them as significant.
- Were required to complete a supplemental environmental impact (EIS) statement before modifying their action beyond the spectrum of alternatives that were analyzed in the IBMP EIS and this violated NEPA.

Plaintiffs seek to set aside the 2019 Winter Plan (IBMP), declare the Agencies violated the Yellowstone Management Act, Organic Act of 1897, APA and NEPA, and permanently enjoin the Agencies from authorizing bison hunting in Beattie Gulch to from within 1 mile of residential homes.

Notice of Intent

Grazing | Region 6

NOI (Dated October 11, 2019) by Western Resources Legal Center (WRLC) alleging the National Marine Fisheries Service (NMFS) and the Forest Service (**Region 6**) are in violation of the Endangered Species Act (ESA) for the legally deficient **June 1, 2018 Biological Opinion** (BO) for **29 Grazing Allotments** for 2018-2022 on the **Malheur National Forest** (MNF).

The WRLC claim:

- The NMFS and the Forest Service failed to provide permittees a meaningful opportunity to submit information for consideration during the consultation process, providing only 5 days for review and comment.

- The NMFS and the Forest Service failed to use the best scientific information available during the consultation process, and the BO is not supported by the on-the-ground evidence.
- The NMFS failed to evaluate whether the conditions imposed in the BO altered the basic design, duration, and timing of the grazing permits via the reasonably prudent measures (RPM) and terms and conditions.
- The NMFS altered the basis design, duration, and timing of the grazing permits with its RPMs and terms and conditions, and it failed to consider whether it made substantial changes to the grazing permits.

The WRCL intends to pursue legal action if the Agencies do not contact the permittees of the grazing allotments and allow them to have a meaningfully opportunity to participate in the consultation process.

Forest Management | Region 1

Supplemented NOI (Dated October 3, 2019) by Alliance for the Wild Rockies (AWR) adding alleged Endangered Species Act (ESA) violations if consultation for the 2011 Access Amendments is not completed for the **Hanna Flats Project** on the **Idaho Pan Handle National Forest** (IPNF) (Region 6). The AWR claims the Forest Service must withdraw the decision for the Hanna Flats Project or otherwise formally suspend project implementation, until such time as consultation on the Access Amendment is complete.

Original NOI (dated August 9, 2019) by AWR alleged the Forest Service and U.S. Fish and Wildlife Service (FWS) violated the ESA pertaining to the project. The AWR claims the Forest Service failed to demonstrate compliance with the IPNF Forest Plan's 2015 Access Amendment's baseline total and open road miles requirements. Specifically, the Forest Service is allowing temporary increase in open roads by allowing known illegal public motorized use to continue on over 16 miles of roads during project planning and implementation. The AWR claims the temporary illegal and known public use on 16.3 miles for multiple years during project planning and implementation does not comply with these unequivocal restrictions for lawful temporary total road increases.

The AWR also claim the Forest Service and FWS failure to address the effects of reasonably certain future illegal road use within the Priest Bears Outside Recovery Zone (BORZ) area violates the ESA and its regulations. A biological assessment must include "[a]n analysis of the effects of the action on the species and habitat, *including consideration of cumulative effects*, and the results of any related studies." These effects are subject to consultation under 50 CFR § 402.02.

Other Cases Filed Against Another Agency/Entity

Western Watersheds Project, et al. v. Janice Schneider, et al. (16-0083, D. Idaho) **Idaho, Wyoming, Colorado, Utah, Nevada, Oregon, and part of California**— On October 16, 2019 the District Court of Idaho issued and order granting the plaintiffs motion for preliminary injunction to enjoin the U.S. Department of Interior (DOI) and the Bureau of Land Management (BLM) from implementing the 2019 BLM **Sage-Grouse** Plan Amendments. The district court concluded:

1. Likelihood of Success on the Merits
   - The plaintiffs are likely to succeed on their claim that the BLM failed to consider reasonable alternatives in violation of the National Environmental Policy Act (NEPA).
   - The plaintiffs will likely prevail on their claim that that BLM's hard look was not done with respect to all six Environmental Impact Statements (EIS) challenged.
   - The BLM's focus on individual States does not include a robust cumulative impacts analysis given the range of the sage grouse. Because that is lacking, the plaintiffs are likely to succeed in the claim that BLM's EISs do not contain a sufficient cumulative impacts analysis under NEPA, and most importantly, do not contain any justification for that failure.
   - The BLM's elimination of mandatory compensatory mitigation through the Final EISs appears to constitute both a "substantial changes" to its proposed action and "significant new circumstances" under 40 CFR Section 1502.9(c), requiring BLM to have issued a supplemental draft EIS for public review and comment before finalizing these changes. Failing to so "insulate[d] [the agency's] decision-making process from public scrutiny. Such a result renders NEPA's procedures meaningless." The plaintiffs are likely to succeed on this claim.
2. Irreparable Harm
   - Numerous site-specific applications of the 2019 Plan Amendments that are upcoming (or have already occurred) include oil and gas well drilling and associated road and pipeline construction in Wyoming; coal mining projects in Utah; gold and other surface mining projects in Nevada; and large phosphate mining projects in Idaho. Given these circumstances, the district court finds that plaintiffs are likely to suffer irreparable harm in the absence of injunctive relief.
3. Balance of Hardships & Public Interest
   - The district court determined that the balance of hardship toward the plaintiffs—sage grouse will suffer more hardships from the 2019 Plan Amendments then the defendants will suffer from reverting to the provisions of the 2015 Plans. The plaintiffs only asked the district court to enjoin BLM from approving new oil and gas well or lease, grazing permit, or other discretionary authorization for use of

> public lands based on the 2019 Plan Amendments. Under the requested injunction, BLM may continue applying the 2015 Plans to upcoming permits, licenses and other approvals; and the plaintiffs reserve the right to challenge such actions as appropriate.

The court stated that "Under these weakened protections, the BLM will be approving oil and gas leases, drilling permits; rights-of-way for roads; pipelines and power lines; coal and phosphate mining approvals and livestock grazing permit renewals." "It is likely that these actions will cause further declines of the sage grouse under the weakened protections."